

CONSTITUTIONAL PERSPECTIVES ON AFSPA

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This paper is an attempt to understand the argument on question of legality and constitutionality of the Armed Forces (Special Powers) Act, 1958 which has been extensively debated for the last few decades. The question is whether the Parliamentary power to enact laws in respect to “Public order” falls within the domain of Entry 1 of the State List. On the one hand whether it falls under Entry 97 of the Union List with Article 246 and Article 248 of the Constitution and after the Constitution (44th Amendment) Act, 1978, Act falls under the realm of Entry 2A of Union List of the Constitution on the other. The second question is apart from Article 352, are special laws really necessary to deal with internal disturbances and public disorders in the country?

The Seventh Schedule of the Constitution of India lays down three kinds of List such as Union List, State List and Concurrent List. The purpose of Seventh Schedule is to limit the legislative powers of State and Parliament to enact laws on preventive detention. Under Article 246, the Parliament and Legislature of the State have its own power to make laws enumerated in the Union List and State List. Article 248 of the Constitution applies to Jammu and Kashmir, in this context; the concept of “terrorist act” under the special laws has the same meaning for the entire part of India. The parliament has an exclusive power to legislate on the areas not included in the State List and Concurrent List as residue powers of legislation lies on it.

Article 257A provides the extension of help to States through deployments of armed forces or other forces of the Union. It read as follows: “257A. *Assistance to States by deployments of armed forces or other forces of the Union.* – (1) The Government of India may deploy any armed force of the Union or any other force subject to the control of the Union for dealing with any grave situation of law and order in any State.”¹ Article 257A uses the expression of ‘law and order’. This is a serious infringement into jurisdiction of State as ‘law and order’ as well

¹ Article 257A was repeal by the Constitution (Forty-Fourth Amendment) Act, 1978. Sec. 33 (w.e.f 20-06-1979) in Bhakshi, P.M. (2002) *The Constitution of India*. New Delhi: Universal Law Publication Co. p.228

as 'public order' are exclusively within the domain of State List of the Constitution. It seems that for this reason, Article 257A was repealed by the Constitution (Forty-Fourth Amendment) Act, 1978.

Entry 2A in Union List allows the Central government to enact any laws which pave the way for deployment of armed forces subjected to its control to any State in aid of civil power. It stated as follows: "2A. Deployment of any armed force of the Union or any other force subject to the control of the Union or any contingent or unit thereof in any State in aid of the civil power; powers, jurisdiction, privileges and liabilities of the members of such forces while on such deployment."²

Along with Entry 2A in Union List, Entry 1 in State List introduce as follows: "Public order the use of any naval, military or air force or any other armed force of the Union or of any other force subject to the control of the Union or of any contingent or unit thereof in aid of civil power".³

In this process, section 3 of the Armed Forces (Special powers) Act, 1958 allows the Governor or administrator of the union territory to declare any part as disturbed or dangerous area. The Amendment Act of 1972 conferred special powers upon the members of the armed forces in disturbed areas not only in the States of Assam and Manipur but also to all the North-Eastern States such as Meghalaya, Nagaland and Tripura and the then Union Territories of Arunachal Pradesh and Mizoram. Under this Act, apart from the Governor of the State or the Administrator of the Union Territory, the Central Government can declare any part or the whole State as disturbed area. The criteria for designation of any area as 'disturbed area' is, if the authorities are of the opinion that there is a law and order situation which creates an internal disturbance for deployment of armed forces 'in aid of civil power'.

In this case, if there is internal disturbance and security of the State is threatened, it obliges the central government to deploy paramilitary forces if it thinks proper under Articles 355. Article 355 states that: "It shall be the duty of the Union to protect every State against external aggression and

² Entry 2A of Union List was added by the Constitution (Forty-Second Amendment) Act, 1976. Sec. 57 (w.e.f. 03-01-1977). in Pylee, M.V (2003) *Constitutional Amendments in India*. Universal Law Publishing Co. Pvt. Ltd. P.199.

³ The expression "the use of any naval, military or air force or any other armed force of the Union or of any other force subject to the control of the Union or of any contingent or unit thereof" was added in Entry 1 in List II by the Constitution (Forty-Second Amendment) Act, 1976.

internal disturbance and to ensure that the Government of every State is carried on in accordance with the provisions of this Constitution". It may be noted here that under Article 355, it is the duty of central government to protect each state and union territory from internal disturbance and external aggression. In this context, it is desirable for the central government to protect the states by deploying armed forces to exercise powers provided by the Central Act.

The Supreme Court in the case of *NPMHR v. Union of India*, 1997 pointed out that Entry 2A of the Union List and Entry I of the State List advocates for deployment of armed forces in aid of civil power with the co-operation of the concerned state administration. It necessitates dealing with situation effectively and restoring peace and normalcy in the state.⁴ The enactment of this Act is intended to carry out its obligation under Article 355 to prevent further aggravation of the situation which if not checked may lead to promulgation of emergency under Article 356.

There are three different kinds of emergency in the Constitution: (i) Proclamation of emergency due to war, external aggression and arm rebellion⁵ (ii) Constitutional crisis in the State and (iii) Financial emergency. Before the Constitution (44th Amendment) Act, the expressions 'external aggression' and 'internal disturbance' were common to both Article 352 and Article 355. It was also relevant to Article 356. Article 352(1) reads as follows:

"if the President is satisfied that a grave emergency exists whereby the security of India or any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance," he could be issuing a proclamation of emergency to that effect. But after the Constitution (44th Amendment) Act, the expression 'internal disturbance' was replaced by the expression 'armed rebellion'. The logic is to limit declaration of emergency only if it is a serious threat to the national security. As a result, the relation between Articles 352 and 355 were partly disconnected.

By the Constitution (42th Amendment) Act, declaration of emergency was immune to judicial review. The immunity was removed by the Constitution (44th Amendment) Act. As a result,

⁴ The Naga Peoples' Movement for Human Rights vs. the Government of India, *The Supreme Court Judgment*, 27 November 1997, available at <http://judis.nic.in/supremecourt/helddis.aspx> (accessed on 12 March 2014).

⁵ Proclamation of emergency cannot be declare merely based on 'internal disturbance' without an actual occurrence of armed rebellion in the whole or any parts of the State; since the expression "internal disturbance" was substituted by 'armed rebellion' by the Constitution (Forty-Second Amendment) Act, 1976. It can also be declared if president satisfied with the presumptions that armed rebellion will be occur.

the constitutionality for the promulgation can be questioned in the court of law. With the promulgation of emergency, legislative powers of the Union Parliament have been broadened. The Central government can legislate on the List II of the Seventh Schedule as the functions of federal Constitution become closer to unitary system.

By the Constitution (44th Amendment) Act, 1978, promulgation of emergency under article 352 has affected the fundamental rights of the citizens in two ways: (i) Article 358⁶ apply to promulgation of emergency on the ground of war, external aggression or armed rebellion. (ii) Article 359⁷ is applicable to the promulgation only on the ground of war and external aggression.

Section 4 of the Act states: “*Special powers of the armed forces.* Any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces may, in a disturbed area,—(a) if he is of opinion that it is necessary so to do for the maintenance of public order, after giving such due warning as he may consider necessary, fire upon or otherwise use force, even to the causing of death, against any person who is acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or of firearms, ammunition or explosive substances”. Clause (a) of section 4 is not absolute. It is qualified by law such as Cr. PC section 144 regarding prohibitory order issued by the civil administration. It prohibits assembly of five or more persons, carrying of weapons, any person acting in contraventions of law and order and if an army officer is of the opinion that it is necessary to do so for the maintenance of public order after giving due warning.

The section 4(b) of the Act requires destroying any arm dumps, prepared or fortified position or shelters from where armed attacks or any structure used for training and hideout for armed gangs for committing an offence. It is necessary to contain their future activities and committing offences.

⁶ Article 358 provides for the suspension of article 19 during emergency. Article 19 provides protection of certain rights regarding freedom of speech, etc.

⁷ Article 359 provides for the suspension of fundamental rights conferred by Part III of the constitution during emergency; except Article 20 and Article 21 cannot be suspended even during the period of emergency.

Similar provision related to section 4(c) of the Act has been included in the Cr. Pc sub-section (1) of section 41 which states that any police officer can arrest a person 'without an order from a Magistrate and without a warrant'⁸ from the court. He can arrest a person if there is concern for 'cognizable offence' or 'a reasonable complaint has made, or credible information has received, or a reasonable suspicion exists'⁹ or for some other reasons with reasonable suspicion exist to that particular person.

Apart from this, Parliament can legislate any laws on preventive detention under the Entry 9 in Union List which provides any person can be arrested or detained on the ground of security of State, defence and foreign affairs. Section 5 of the Act states: "*Arrested persons to be made over to the police* – Any person arrested and taken into custody under this Act shall be made over to the officer in charge of the nearest police station with the least possible delay, together with a report of the circumstances occasioning the arrest". It has been observed in the case of *Horendi Gogoi v. Union of India*, (1991) that the arrested person should be produced to nearest police station within the least possible time and also informing him the reason for the arrest. The officer arresting a person under preventive detention has to follow the procedure in consonance with clauses (1) and (2) of Article 22 of the Constitution.

Section 4(d) of the Act allows the armed forces to enter and search any premises without warrant, to arrest a person or seize a stolen property or any unlawful arms, ammunition and explosive substances. If required they can use force while searching and arresting any suspected person. The police officer exercises the same power provided by section 47 of Cr. PC which has some minimum safeguard provisions and more comprehensive than that of the Central Act. The misuse of the Act will be reduced if search and enter of any premises is carried out strictly under the provisions of section 47 of Cr. PC. In the case of the *State of Nagaland vs. Ratan Singh, etc.* (1966), the court observed that even though Cr. PC Chapters VIII, X and XI are not applicable in the tribal areas of Nagaland, Assam, Meghalaya, Tripura and Mizoram, the administrators should follow substance of these laws.

Security forces are totally insulated from legal action or prosecution without prior permission from the Central Government provided under section 6 of the Act. This provision is also included in the Cr. PC. sections 45 and 197 provide protection from arrest and prosecution. If

⁸ Cr Pc Section 41 (1)

⁹ *Ibid*, Section 41 (1) (a)

a person gets a sanction from the Central Government, he can appeal to the court under sections 76 and 79 of Indian Penal Code. To take prior permission from the central government to prosecute those armed forces who violated the human rights is totally unnecessary as it is the duty of the legal community to investigate and start the court proceedings. It is very difficult to get permission from the central government even though there is a judicial review for refusal or granting sanction by the centre government. It is an uphill task, long process, unresponsive from the authority and it is absolutely unreliable for the victims to get legal justice.

CONCLUSION

In the nutshell, the AFSPA is one of the many special laws which have provide policing responsibility to the armed forces to deal with the special situation of waging a war against the state. At the same time, it has violated the rights of the citizens conferred by the constitution by misusing the special powers. After thoroughly examined the legal and constitutional aspects of the Act, the setting up of an independent institutional mechanism may be a better option to receive complains and redress the grievances of people. Investigation of human rights violation should be conducted independently and quickly and a person guilty of crime irrespective of whether state or non-state actor must be given appropriate punishment under the due process of law. In this process, authorities should strictly forbid interfering in the legal proceedings and let the due process of law take its own course. Innocent civilians should not be victimized simply for the sake of national security.